United States Court of Appeals

for the Second Circuit

APPENDIX

76-1007

To be argued by
RICHARD A. GREENBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

GERALD DEVINS,

Appellant.

Docket No. 76-1007

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
GERALD DEVINS
FEDERAL DEFENDER SERVICES UNIT
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RICHARD A. GREENBERG,
Of Counsel.

D. C. Form No. 169

CRIMINAL DOCKET

74 CRIM. 1052

TITLE OF CASE	ATTORNEYS
THE UNITED STATES vs. 1. GERALD DEVINS- all cts. 2. CLAUDE HILL-1&3 3. MAX KING-1 11/21/75	*For U. S.:* George E. Wilson, AUSA. 791-1952 *For Defendant:* (1) Bernard Coven 747 Third Ave, NYC 10 tele: 758-7090.

ABSTRACT OF COSTS (05)	AMOUNT	CASH RECEIVED AND DISBURSED: DATE	NAME	RECEIVED	DISBURS
Fine,					
Clerk, 2/3/11					
Marshal,					
Attorney,					
Commissioner's Court,					
Witnesses,					
18:1001 False statements to S.B.A. (Cts.2&3)					
15:645(a) Overvalution of a security in an appl. for S.B.A. loan. (Ct.4)					
18:371 Consp. so to do. (Ct.1)					
(Four Counts)					

DATE	PROCEEDINGS
11-8-74	Filed indictment and ordered sealed. Cannella,J.
12-5-74	Indictment ordered unsealed. Metzner,J.
12-16-74	Deft.Devins(atty. present) Pleads not guilty.Motions returnable in 10 d Case assigned to Judge Gagliardi as a related matter. Deft. ordered photographed and fingerprinted. Bail fixed in 74Cr 1055 to cover this indictment also. Defts. Hill and King(attys. present) Defts. plead not guilty. Defts. t be photographed and fingerprinted. Defts. bail fixed by the Court at $10,000. P.R.B. to be co-signed by a responsible person within 24 hrs for defts. Hill & King. Carter,J.
12-16-74	Devins: Filed copy of P.R.B. in the amt. of $10,000. dtd.12/16/74.

DATE	PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT
2/16/74	M. King- filed P.R.B. in the sum of $10,000.		
2/16/74	C. Hill- filed P.R.B. in the sum of $10,000.		
3-21-75	Filed defts. C. Hill & M. King's examination on the voir dire.		
3-24-75	G. Devins- filed notice of appearance of atty. Bernard Jay Covea.		
4-16-75	Filed one envelope ordered sealed and impounded and placed in vault in room 506. Gagliardi,J.		
5-07-75	Before Judge Gagliardi-jury trial begun.		
5-08-75	Trial cont'd.		
5-09-75	" "		
5-10-75	" "		
5-13-75	" "		
5-14-75	" "		
5-15-75	" "		
5-16-75	" "		
5-17-75	" " as to Devins & Hill only. Max King is severed from this trial. Bail is exonerated as to deft. Max King on this indictment.		
5-18-75	" "		
5-21-75	" "		
5-22-75	" "		
5-23-75	Trial cont. Jury returns with a verdict on deft. Devins only - counts 1,2,3 & 4 guilty. Pre-sentence investigation ordered. For sentence 6-12-75 at 9:30. Deft. to report every Wednesday at 10 to his atty. Bernard Jay Covea. Deft. cont'd. on present bail until date of sentence.		
5-24-75	Trial cont'd as to deft. Hill. Jury returns with a verdict at 11:45 on Hill counts 1 & 3 not guilty. Gagliardi,J.		
5-25-75	Filed memo. of law in support of defts.' motion to preclude the Govt. from the use of the Grand Jury testimony of the defts. Claude Hill and Max King because of the ineffective assistance of counsel due to conflict of interest.		

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS
06-17-75	Filed deft. Devins affdvt. re: adjournement of trial,etc.(also 1051 & 1055).
09-04-75	Max King-entered and filed nolle prosequi. Gagliardi,J.
09-23-75	Filed Govt.'s sentencing memorandum.
9-24-75	Filed transcript of record of proceedings, dated Apr. 7,8,9,10,11,1975
9-24-75	Filed transcript of record of proceedings, dated Apr. 14,15,16,17,18,
9-24-75	Filed transcript of record of proceedings, dated. Apr.21,22,23,24,1975
10-03-75	Filed Stip. & Order re: sentenceing of deft. Gerald Devins.Gagliardi,J (also in 74 Cr. 1051,1055 and 75 Cr. 544)
10-28-75	Filed deft. Gerald Devins's notice of motion re: dismissal,etc.
10-28-75	Filed deft. Gerald Devins' memo. of law re: support of motion to dismiss,etc.
10-30-75	Filed deft. G. Devins' suppl. affdvt. re: motion for judgmentof acquittal.
11-12-75	Filed One envelope ordered sealed and impounded and placed in vault in room 601. Gagliardi,J.
11-12-75	Filed Govt.'s affdvt. re: opposition to deft.'s motion to dismiss.
11-13-75	GERALD DEVINS (atty. present) Filed JUDGMENT - deft. is committed to the custody of the Atty. Gen'l. for imprisonment for a period of 15 mons. of each of counts 1,2 and 3 concurrently and 6 mons. on count 4 to run concurrently with sentence imposed on counts 1,2,& 3., and the deft. is placed on probation for a period of 2 yrs. subject to the standing probation order of this Court, to commence upon release from confinement. Gagliardi,J. issued all copies.
11-21-75	Filed deft. Devins' notice of appeal from the denial of post-trial motios and the judgment of donviction, entered 11-13-75. mailed copies
11-25-75	Filed Memo-End on back of motion fld 10-28-75 ..Motion denied.. ...Gagliardi,J.

A TRUE COPY
RAYMOND F. BURKHARDT, Clerk
By [signature]
Deputy Clerk

EW:ap

74 CRIM. 1052

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

-v- : INDICTMENT

GERALD DEVINS, CLAUDE HILL and MAX KING, : 74 Cr.

Defendants. :

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The Grand Jury charges:

1. From on or about June 1, 1973, up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere, GERALD DEVINS, CLAUDE HILL and MAX KING, the defendants, unlawfully, wilfully and knowingly did combine, conspire and confederate and agree together and with each other and with persons to the Grand Jury known and unknown, to defraud the United States and its departments, and agencies in connection with the performance of their lawful governmental functions by obstructing and hindering the United States Small Business Administration in administering the Small Business Act, Title 15, United States Code, Section 631 et seq and to violate Title 18, United States Code, Section 1001 and Title 15, United States Code, Section 645(a).

2. It was a part of said conspiracy that the defendants, and their co-conspirators, in matters within the jurisdiction of a department and agency of the United States, that is, the United States Small Business Administration, unlawfully, wilfully and knowingly would and did falsify,

conceal and cover up and cause to be falsified, concealed and covered up by trick, scheme and device material facts and make and cause to be made, false, fictitious and fraudulent statements and representations and would make and use and cause to be made and used false writings and documents, knowing the same to contain false, fictitious and fraudulent statements and entries.

3. It was further a part of said conspiracy that the defendants, and their co-conspirators, would and did unlawfully, wilfully and knowingly overvalue and cause to be overvalued a security and make and cause to be made false statements, for the purpose of obtaining for themselves and others a loan from, and for the purpose of influencing in any way the action of the United States Small Business Administration on behalf of R.B.G. Film Distributors, Inc.

4. Among the means by which the defendants and their co-conspirators would and did carry out the unlawful purposes set forth above were the following:

(a) R.B.G. Film Distributors, Inc. (hereinafter "R.B.G.") a corporation, the purported business of which was to distribute motion picture film would be formed.

(b) R.B.G. would apply for a $50,000 Economic Opportunity Loan from the United States Small Business Administration (hereinafter "S.B.A.").

-2-

(c) The defendant, GERALD DEVINS, would prepare a loan application and supporting papers for R.B.G. to submit to the S.B.A., and would falsely overstate the value of the stock, assets and other collateral of R.B.G. therein.

(d) The defendant, GERALD DEVINS and CLAUDE HILL, would, as part of the supporting documentation, prepare a fictitious contract between a non-existent corporation, National Tele Pix, Inc., 4584 Austin Boulevard, Island Park, New York and R.B.G., which purported to grant to R.B.G. distribution rights to films known as the Wally Western series, which fictitious contract they caused to be submitted to the S.B.A. in support of R.B.G.'s application for a loan.

(e) Based on the application and supporting papers described in subparagraphs (c) and (d) of paragraph 4 of Count One of this indictment, the United States Small Business Administration would grant a $50,000 Economic Opportunity Loan to R.B.G.

OVERT ACTS

In furtherance of, and to effect the objects of said conspiracy, the defendants and their co-conspirators committed the following overt acts, among others, in the Southern District of New York, and elsewhere:

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1. On or about July 10, 1973 the defendants and their co-conspirators caused an application for an S.B.A. loan to be submitted to the S.B.A. office, 26 Federal Plaza, New York, New York.

2. On or about August 1, 1973, the defendants GERALD DEVINS and CLAUDE HILL met with other co-conspirators.

3. On May 15, 1974 a $50,000 loan was received on behalf of R.B.G. from the S.B.A. by the defendants and their co-conspirators

4. On May 15, 1974, the defendant, MAX KING, received a check for $30,000 from one of his co-conspirators.

(Title 18, United States Code, Section 371)

COUNT TWO

The Grand Jury further charges:

On or about July 10, 1973 in the Southern District of New York, in a matter within the jurisdiction of a department and agency of the United States, to wit, the United States Small Business Administration, GERALD DEVINS, the defendant, unlawfully, wilfully and knowingly would and did falsify, conceal and cover up, and cause to be falsified, concealed and covered up, by trick, scheme and device, material facts and did make and cause to be made false, fictitious and fraudulent statements and representations and would and did make and cause to be made and use and cause to be used false writings and documents knowing the same to contain false, fictitious and fraudulent statements and entries in that the defendant, GERALD DEVINS, submitted and caused to be submitted to the United States Small

Business Administration an application for a $50,000 loan in which it was represented that as of May 31, 1973 R.B.G. Film Distributors, Inc. was a corporation; that said corporation as of May 31, 1973 had total assets of $23,500; and that said corporation could offer as collateral for a loan inventory with a cost and net book value of $47,500 with no present liens or mortgage balance, when in truth and fact as he then and there well knew said statements and documents were untrue.

(Title 18, United States Code, Sections 1001 and 2)

COUNT THREE

The Grand Jury further charges:

On or about August 1, 1973, in the Southern District of New York, in a matter within the jurisdiction of a department and agency of the United States, to wit, the United States Small Business Administration, GERALD DEVINS and CLAUDE HILL, the defendants, unlawfully, wilfully and knowingly made and caused to be made false, fictitious and fraudulent statements; and did falsify, conceal and cover up, and caused to be falsified, concealed and covered up, by trick, scheme and device material facts, and did make and use false writings and documents knowing the same to contain false, fictitious and fraudulent statements and entries, in that the defendants, GERALD DEVINS and CLAUDE HILL, submitted and caused to be submitted to the United States Small Business Administration, an agreement in which it was represented

that National Tele Pix, Inc. of 4584 Austin Boulevard, Island Park, New York, was a corporation; and that said corporation had produced a feature motion picture entitled Wally Western Series and could and would make delivery to R.B.Grosvalet, Inc. of a laboratory access letter for said picture; when in truth and in fact as they then and there well knew said statements and documents were untrue.

(Title 18, United States Code, Sections 1001 and 2)

COUNT FOUR

The Grand Jury further charges:

On or about July 10, 1973, in the Southern District of New York, GERALD DEVINS, the defendant, unlawfully, wilfully and knowingly, did make and cause to be made false statements and did overvalue and cause to be overvalued a security in an application filed with the United States Small Business Administration for the purpose of obtaining for himself and for an applicant a loan and for the purpose of influencing the action of the United States Small Business Administration, and obtaining money from the United States Small Business Administration, in that the defendant, GERALD DEVINS, stated and represented and caused to be stated and represented in the said application that the capital stock of R.B.G. Film Distributors, Inc. was valued at $15,000 when as he then and there well knew

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said statements and representations were untrue.

(Title 15, United States Code, Section 645(a)
and Title 18, United States Code, Section 2)

FOREMAN

PAUL J. CURRAN
United States Attorney

A TRUE C[illegible]
RAYMOND F. [illegible] Clerk
By [illegible]
Deputy Clerk

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Court
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HILL, and

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CURRAN
Attorney.

Foreman.

NOV 8 1974 Indictment ordered sealed
JUDGE GAGLIARDI Carnella, J.

DEC 5 1974 Indictment ordered unsealed
Metzner J.

DEC 16 1974 Deft Beers appears (atty Edel Proulx present) Deft pleads N/G Case assigned to Gagliardi J as a related matter. 10 days for motions. Deft to be R/R Bail fixed in 74 Cr 1055 to cover this Indictment also — Carter, J.

DEC 16 1974 Deft Hall & Jeng appears (atty present) Defts plead N/G Defts to be R/R Bail Fixed by the Court at $5,000 PRB to be Co-signed by a responsible person unrelated 24 hours for Defts Hall and Jeng Carter, J

APR 7 1975 Before Gagliardi J - Jury trial - begun ....
APR 8 1975 - trial continued
APR 9 1975 - trial continued
APR 10 1975 - trial continued
APR 11 1975 - trial continued
APR 14 1975 - trial continued
APR 15 1975 - trial continued
APR 16 1975 - trial continued as to DEVINS & HILL ONLY
APR 17 1975 - trial continued (DEFENDANT - MAX King is severed from this trial - Bail is exonerated as to Deft MAX KING on this indictment -)
APR 18 1975 - trial continued
APR 21 1975 - trial continued
APR 22 1975 - trial continued
APR 23 1975 - trial continued - Jury returns with a verdict as to Deft DEVINS only, Count 1 - guilty 2 - guilty - 3 guilty - 4 - guilty - P.S.I Ordered for sentence 6-12-75 @ 9:30. Deft to report every Wednesday at 10:00 to his Attorney BERNARD JAY COHEN. Deft continued on present bail until date of sentence.

APR 24 1975 Trial continued as to Deft Hill - Jury returns with a verdict at 11:45 on Deft Hill - Count 1 - not guilty to ct 3 - not guilty.

Gagliardi J.

09-04-75 Max King - Entered & Filed Nolle prosequi

Gagliardi J.

NOV. 13, 1975 - GERALD DEVINS (Atty Robert G. Morvillo, presnet) Deft. sentenced to ~~4~~ 15 months Impr. on each of counts 1-2-3- and 6 months on count 4 CONCURRENTLY and placed on probation for 2 years to commence upon release from confinement. Deft. continued on present bail, pending appeal.

GAGLIARDI, J.

CHARGE OF THE COURT

THE COURT: (Gagliardi, D. J.) Ladies and gentlemen of the jury:

You are now about to enter upon your final duty, which is to decide the fact issues in this case. As I told you in my instructions at the beginning of the trial, your principal function during the taking of testimony would be to listen carefully to and observe each witness as he testified, and it has been evident to me, and as counsel have also noted, that you have faithfully discharged this duty.

The trial of this case has been somewhat protracted, but nonetheless your interest never lagged, and it is evident that you have followed the testimony with close attention.

We have now reached the point in the case where all the evidence has been presented and opposing arguments of the lawyers have been made and, shortly after I have completed my explanation of the law, you will retire to deliberate upon your verdict.

MP 4

You are to perform your final duty in an attitude of complete fairness and impartiality. You are to appraise the evidence calmly and deliberately and, as was emphasized by me at the time of your selection as jurors, without bias or prejudice with respect to either the Government or to the defendants as parties to this controversy.

Now, the fact that this prosecution is brought in the name of the United States of America entitles it to no greater consideration than that accorded to any other party in the case, and, by the same token, it is entitled to no less consideration. All parties stand as equals before the bar of justice.

Your final role is to pass upon and decide the fact issues in the case. You, the members of the jury, are the sole and exclusive judges of the facts. You pass upon the weight of the evidence. You determine the credibility of the witnesses. You resolve such conflicts as there may be in the testimony, and you draw whatever reasonable inferences that are to be drawn from the facts as you have determined them.

My function at this point is to instruct you as to the law. It is your duty to accept these instructions and apply them to the facts as you determine the facts. The logical result of that application will be your verdict in this case.

M2 5

With respect to any fact matter, it is your recollection and yours alone that governs. Anything that counsel, either for the Government or the defendants, may have said with respect to any matters in evidence, that is to say, as to any factual matter, whether stated in a question, in argument or in summation, is not to be substituted for your own independent recollection.

So, too, anything the Court may have said during the progress of the trial with respect to any fact matter or may say during the course of these instructions is not to be taken in substitution for your own independent recollection, which governs at all times.

Now, before we consider the precise charges of the indictment, I believe you may be helped by a number of preliminary observations.

In determining the facts, you should not be influenced by rulings that the Court may have made during the trial. These rulings dealt solely with matters of law and not questions of fact, and counsel for both sides not only have the right but, indeed, the duty to press whatever legal objections they believe existed as to the admission of proffered evidence. The Court's rulings on objections made either by the attorney for the Government or the attorneys for the defendants are not to be considered by you.

MP 6

Of course, as I told you at the outset, where I have sustained an objection to a question, you must not speculate on what the witness would have said had he been permitted to answer, nor may you draw any inference from the wording of the question or that it was asked.

You must never speculate about the truth of any insinuation or suggestions contained in a question asked of a witness. A question is not evidence, and it may be considered only as it supplies meaning to an answer.

Similarly, where testimony has been stricken, it is not evidence, and you are bound to disregard it. However, you must remember that in ruling on objections, the Court is deciding questions of law and not questions of fact. The latter are for the jury alone.

Now, a particular cautionary note in this case. During the course of the trial, there were occasions -- and numerous occasions; I guess not more than I have experienced before, though -- when I have admonished either the Government or the defense lawyers. Now, sometimes in the ardor of advocacy, counsel say or do things which in calmer moments they would not have said or done. Any of these incidents that took place during the course of this trial must play no part whatsoever in your deliberations. The personalities of the lawyers or of the Judge have nothing to do with the case.

MP 7

I recognize that in many instances a Judge can have a great deal of influence with the jury. I want you specifically to understand that I have no opinion with respect to the guilt or innocence of these defendants. If you do think that you have gleaned some indication as to my opinion of the case, either from any questions I may have asked or from my expression or tone of voice, disregard it entirely. The Court has no opinion as to the veracity or credibility of the witnesses or the merits of the case. You are the judges of the facts, and you are the sole judges of the guilt or innocence of these defendants. I am merely a judge of the law, and the fact issues must be decided by you, solely and only within the framework of the evidence and the principles of law that apply.

Finally, please don't single out any one instruction of mine as stating the law alone. Take them all into account after you have heard them all.

Now, you are to consider only the evidence in this case, which consists of the sworn testimony of the witnesses, the exhibits which have been received in evidence, the facts which have been stipulated and the presumptions which I will tell you about in these instructions, such as the presumption of innocence. But while you are to consider only the evidence, you are not limited to the bald statements of the

MP 8

witnesses. On the contrary, you are permitted to draw from the facts which you find have been proved such reasonable inferences as seem justified to you in the light of your own experience.

An inference is merely a fancy word for a conclusion which reason or common sense leads you to draw from the facts that have been proved to you.

In considering the evidence, you must remember, as I told you at the outset, that the indictment is only a formal method of accusing a defendant of the crime charged, and it itself is not evidence against the defendants; nor is any weight to be given to the fact that an indictment has been returned against the defendants.

Generally speaking, there are two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence, such as the testimony of an eye witness, somebody who saw or heard something done or said; and the other is indirect, or circumstantial, evidence, and circumstantial evidence is the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

Generally, the law makes no distinction between direct and circumstantial evidence but simply requires that the jury find the facts in accordance with all the evidence in

MP 9

the case, both direct and circumstantial.

We have a common example that is used by many judges to illustrate what is meant by circumstantial evidence.

Assume that when you came to this courtroom this morning it was a nice, bright, sunshiny day, such as it is -- no clouds in the sky; the sun was out, bright. In addition, I want you to assume that we were in the courtroom on the first floor of the building, one of those modern courtrooms which they have down there, which is airconditioned, and there are no windows in the room.

Now, assume that after you have been in court for an hour or so, somebody walks in, and his clothes are damp; there is a little dampness on his forehead, his hair. Assume that a minute or two later somebody else walks in, and he has an umbrella that is dripping water and a hat in hand which is also dripping water.

Now, even though you could not look out and directly observe the weather, and even though it was not raining when you entered the courthouse, you could reasonably and logically conclude from the combination of facts that I have described to you that in fact it is raining outside, even though when you came in in the morning it had been a nice, sunshiny day.

That is what we call circumstantial evidence: a chain of circumstances which leads you to conclude that a

MP 10

fact exists or doesn't exist.

As I indicated to you before, the law makes no distinction between direct evidence and circumstantial evidence.

Now, referring back to the fact that the indictment is not evidence, the defendants here have entered a plea of not guilty to the charges of the indictment. Thus, the burden upon the prosecution is to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant, for the law never imposes upon a defendant in a criminal case a burden or duty of calling any witnesses or producing any evidence. The law presumes a defendant to be innocent of crime, and thus a defendant, though accused, begins the trial with no evidence against him, and the law permits nothing but legal evidence to be presented before you as jurors to be considered in support of any charge against the defendant.

The presumption of innocence remains with the defendant throughout the trial and your deliberations until such time, if ever, that you are satisfied of his guilt beyond a reasonable doubt. The presumption of innocence alone is sufficient to acquit the defendant unless and until, after careful and impartial consideration of all the evidence in the case, you as jurors are unanimously convinced of a defendant's guilt beyond a reasonable doubt -- and I will define for you later on in these instructions the term "reasonable

MP 11

doubt".

Now, I am going to the specific charges alleged in the indictment.

This indictment contains four counts or accusations. Each of these counts charges a separate crime, and each count must be considered by you separately.

As I told you at the outset of the case, the indictment names three defendants in all. Only two defendants are on trial before you. They are the only persons whose guilt or innocence you must announce in your verdict. The fact that the defendant Max King is no longer on trial before you or that other persons, although named as co-conspirators, were not indicted as defendants is not to enter into your consideration or your deliberations except insofar as it may bear on their credibility as witnesses and, as I will explain to you shortly, insofar as in considering the guilt or the innocence of the defendants on trial you may have to determine the nature of the participation, if any, of others.

In your determination of innocence or guilt, remember that a separate crime or offense is charged against one or both of the defendants in each count of the indictment and that each offense and the evidence pertaining to it should be considered separately.

The fact that you may find one or both the defendants

MP 12

guilty or not guilty of one of the offenses charged should not control your verdict as to any other offense charged against either defendant.

In your deliberations, it is your duty to give separate personal consideration to the case of each individual defendant. As you do so, you should analyze what the evidence in the case shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against another defendant. Remember that each defendant is entitled to have his case determined from evidence as to his own acts and statements and conduct and any other evidence in the case which may be applicable to him.

In sum, the case of each defendant as to each separate count must be decided on the proof or lack of proof of each particular charge against that defendant.

Now, all counsel in their summations have fully reviewed the evidence and urged upon you their various contentions. Usually, I marshal the evidence, but the summations here have been so thorough that if I were to follow my customary practice it would be at the risk of unnecessary repetition, and counsel have agreed that there is no need for me to do so in this case.

However, before I further instruct you on the law, I believe it would be helpful and appropriate at this time to

MP 13

very briefly identify the witnesses who have appeared before you, in the order in which they were called.

Remember that, as I talked to you earlier, with respect to any fact matter, it is your recollection and yours alone that governs. While I have carefully gone through my notes and the transcript of the evidence in preparing the summary of witnesses which I am about to read to you, nothing I say is to be taken in substitution for your own independent recollection, which governs at all times.

Moreover, all evidence, whether or not I have referred to it or counsel have alluded to it in their summations, is important and must be considered by you.

The first witness on the stand was John Gaeta, the chief of the finance division of the Small Business Administration. He was withdrawn after testifying, and he was succeeded by Marion Goldberg, who is the custodian of the Small Business Administration files.

The next witness was Karen Klein, an acquaintance of Robert B. Grosvalet and Silvie Kristof. She was followed on the stand by Robert Grosvalet, and after we were substantially into most of his testimony he was taken off the stand at the conclusion of his direct examination, and a witness named Frank Naudus was put on, and he is a printer in Island Park, Long Island.

After mr. Naudus had completed his testimony, Robert Crosvalet was placed on the stand again for cross-examination.

The next witness, whose testimony I ordered stricken and which you will disregard, was John F. Ferguson, so his testimony is not in this case, nor should it be considered by you in any way.

The next witness was Louis Wolfe, who is supervisor of records of a movie laboratory. He was followed by Irving Singer, retired former motion picture executive, who was a representative of SCORE.

The next witness was Guy Runyon, former vice president of Trans America. He was followed on the stand by Silvie Kristof.

The next witness was Nicholas Siviglia. He was followed on the stand by Bertram Schulman, an attorney with the Small Business Administration, and, after that, Mr. Gaeta, who had been the first witness, was recalled, but he was excused from the stand, and counsel entered into a stipulation, which was read to you at that time, with respect to the reliance of the Small Business Administration on the papers submitted to it in connection with the application involved herein.

The next witness was Gary Wolff, who is an attorney. He was followed on the stand by Richard Shields, presently a

president of Dante Industries and a former president of American Diversified Industries.

The next witness was Allen Green, vice president of American Bank & Trust Company. Then we had the direct examination of Mr. August della Pietra, and during the course of his examination he was withdrawn from the stand, and Mr. Lawrence Grossberg took the stand. He is vice president of Martin Audio.

After Mr. Grossberg had completed his testimony, Mr. della Pietra was recalled and was further examined, and the last Government witness was Mr. C. E. Feltner, Jr.

Then the defendant Devins called to the stand Bernard E. Creamer, an assistant cashier of the United States National Bank & Trust Company of Cuddebackville, New York; and the last witness before you was Mr. Andrew Heberer, an examiner of questioned documents.

You will recall that Mr. Creamer was off the stand and Mr. Heberer was back on the stand at different times, but they were the last two witnesses, although their appearance on the stand was interrupted by certain matters.

So much for the list of witnesses who appeared before you.

Now, as to the specific charges here.

The indictment charges in its four counts a first

MP 16

count of conspiracy and what are called three substantive counts. The substantive counts and conspiracy counts are governed by different legal principles. Since the essential elements which the Government must prove are different in the instance of each count, I will advise you about them separately. I will begin with the conspiracy count.

Incidentally, you have the right to have with you in the jury room the indictment. I will read most of it, but not all of it, but you will have it available to you as well as any of the other exhibits that are in evidence.

Now, Count 1, which is the conspiracy count, charges that the defendants violated Title 18 of the United States Code, Section 371 -- and you don't have to remember the title or the names or the numbers of these sections but just the substance of them -- which provides in pertinent part as follows:

> "If two or more persons conspire either to commit offenses against the United States or to defraud the United States or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each commits a crime."

The conspiracy count is divided into two sections. The second section refers to overt acts, which I will read

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separately, but the first section of Count 1 reads as follows:

"The Grand Jury charges:

"1. From on ro about June 1, 1973, up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere, Gerald Devins, Claude Hill and Max King, the defendants, unlawfully, wilfully and knowingly did combine, conspire and confederate and agree together and with each other and with persons to the Grand Jury known and unknown, to defraud the United States and its departments and agencies in connection with the performance of their lawful governmental functions by obstructing and hindering the United States Small Business Administration in administering the Small Business Act, Title 15, United States Code, Section 631 et seq., and to violate Title 18, United States Code, Section 1001 and Title 15, United States Code, Section 645(a).

"2. It was a part of said conspiracy that the defendants and their co-conspirators, in matters within the jurisdiction of a department and agency of the United States, that is, the United States Small Business Administration, unlawfully, wilfully and knowingly would and did falsify, conceal and cover up and cause to be falsified, concealed and covered up by trick, scheme and device material facts and make and cause to be made false, fictitious and fraudulent state-

ments and representations and would make and use and cause to be made and used false writings and documents, knowing the same to contain false, fictitious and fraudulent statements and entries..

"3. It was further a part of said conspiracy that the defendants and their co-conspirators would and did unlawfully, willfully and knowingly overvalue and cause to be overvalued a security and make and cause to be made false statements for the purpose of obtaining for themselves and others a loan from, and for the purpose of influencing in any way the action of the United States Small Business Administration on behalf of R.B.G. Film Distributors, Inc."

I am omitting that part of the indictment which refers to the means by which it is alleged that the defendants would and did carry out the unlawful purposes.

Three essential elements are required to be proved in order to establish the offense of conspiracy charged in the indictment. Before you may find a defendant guilty of conspiracy, you must be satisfied that the Government has established each of these three essential elements by proof beyond a reasonable doubt.

The essential elements are:

First, that at or about the time alleged in the indictment an agreement existed between two or more of the

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alleged conspirators to commit at least one of the crimes described in Count 1.

Second, that the particular defendant you are considering knowingly and wilfully became a member of the conspiracy, and

Third, that one of the conspirators knowingly committed one of the overt acts set forth in the indictment at or about the time alleged and that at least one overt act was committed in the Southern District of New York, which, for our purposes, is the Manhattan County as well as other counties. For our purposes, Manhattan County is sufficient.

Now, I will define for you a conspiracy, which is the first element.

Simply defined, a conspiracy is a combination of two or more persons by concerted action to accomplish some unlawful purpose or to accomplish some lawful purpose by unlawful means.

A conspiracy is an unlawful combination or agreement to violate the law. Whether or not the persons charged in the indictment accomplished what it is alleged they conspired to do is immaterial to the question of guilt or innocence. Thus, the success or lack of success of the conspiracy does not matter, for a conspiracy is a crime entirely separate and distinct from the substantive crime that may be the goal of

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the conspiracy.

A conspiracy has sometimes been called a partnership in criminal purposes, in which each member becomes the agent of every other member.

In order to establish the existence of a conspiracy, the Government is not required to show that two or more persons sat around a table and entered into a solemn compact, orally or in writing, stating that they have formed a conspiracy to violate the law and setting forth the details of the plan, the means by which it is to be carried out or the part to be played by each conspirator. Your common sense will tell you that when men undertake to enterinto a conspiracy, much is left to unexpressed understanding. Conspirators do not usually reduce their agreements to writing or acknowledge them before a Notary Public, nor do they publicly broadcast their plans. A conspiracy is usually characterized by secrecy.

In determining the existence or non-existence of a conspiracy, it is not required that you find that each and every one of the alleged co-conspirators joined in the conspiracy. It is sufficient if you find beyond a reasonable doubt that two or more persons, in any manner, through any contrivance, impliedly or tacitly, came to a common understanding to violate the law.

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In determining whether there has been an unlawful agreement you may consider acts and conduct which are done to carry out a criminal purpose. Usually, the only evidence available is that of disconnected acts on the part of the alleged conspirators, which acts you may find, when taken together and in connection with each other and with the reasonable inferences flowing therefrom, show a conspiracy or agreement to secure a particular result, as satisfactorily and conclusively as more direct proof.

If upon consideration of all the evidence, direct and circumstantial, you find beyond a reasonable doubt that the minds of at least two of the alleged conspirators met in an understanding way and that they agreed, as I have explained a conspiratorial agreement to you, to work together in furtherance of the unlawful scheme alleged in the indictment and that thereafter at least one of the co-conspirators did any overt act to effect the object of the conspiracy, then proof of the existence of a conspiracy is established. And you will recall that I told you earlier that it is not necessary for the Government to prove the success of the conspiracy in order to establish a violation of the conspiracy statute.

A conspiracy is basically the agreement to violate the law, and it may exist even though the final objectives are never accomplished.

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Now, in connection with this first element -- that is, the existence of the alleged conspiracy, you will recall that I defined a conspiracy as a combination of two or more persons by concerted action to accomplish some unlawful purpose or to accomplish some lawful purpose by unlawful means. Thus, before you may find that a conspiracy existed, you must also find that what the conspirators intended to do would have violated one or more Federal laws if they had succeeded in accomplishing what they set out to do.

The indictment sets out or charges that the conspiracy had as its object or purpose the violation of the following statutes: Title 18, United States Code, Section 1001, which makes it a crime to falsely conceal and cover up by trick, scheme or device material facts or to make false, fictitious or fraudulent statements or representations or to make and use false writings and documents in a matter within the jurisdiction of a department or agency of the United States -- in this case, the Small Business Administration.

The other statute which is alleged as one of the objects of the conspiracy to violate is Title 15, United States Code, Section 645(a), which makes it a crime to make false statements or to intentionally overvalue securities in an application filed with the United States Small Business Administration for the purpose of obtaining a loan.

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I will later describe more fully the charges of the indictment alleging in part the illegal purposes of the conspiracy.

It is not necessary, in order to prove the conspiracy alleged, that all of the unlawful purposes or objects were agreed upon. It is sufficient if the proof establishes beyond a reasonable doubt that one such alleged purpose was understood.

An unlawful conspiracy may exist even though its purposes are not accomplished, and evidence that its purposes were accomplished may be considered by you, if you find that there is such evidence, as proof of the existence of the conspiracy.

The indictment charges that the alleged conspiracy began on or about June 1, 1973 and continued to on or about November 8, 1974. It is not essential that the Government prove that the conspiracy started and ended on or about those specific dates. It is sufficient if you find that in fact a conspiracy was formed and existed for some substantial portion of time within that period set forth and that at least one of the overt acts was committed in furtherance thereof in that period.

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A conspiracy, once formed, continues for as long as the evidence shows the conspirators intended to continue it. Such intention may be inferred from such activities, if any, of the conspirators which you find to be, in furtherance of the purpose of the conspiracy.

Now, the second element, participation in the conspiracy. If you find beyond a reasonable doubt that the conspiracy charged in the indictment existed, you must determine who its members were.

In determining whether a defendant became a member of the conspiracy, you must determine not only whether he participated in it, but whether he did so with knowledge of its unlawful purpose. Did he join with an awareness of at least some of the aims and purpose of the conspiracy?

Knowledge is a matter of inference from facts that have been proved. It is not necessary that a defendant be fully informed as to the details or the scope of the conspiracy in order to justify an inference of knowledge. A defendant need not know the full extent of the conspiracy and all of its activities and actors. However, mere association with one or more of the conspirators does not make one a member of the conspiracy. Nor is knowledge without participation sufficient. What is necessary is that the defendant participate with knowledge of at least some of the

purposes of the conspiracy and with the intent to aid in the accomplishment of those unlawful ends.

In determining whether a conspiracy existed you should consider the acts and declarations of all the alleged participants. However, in determining whether a particular defendant was a member of the conspiracy you may consider only his own acts and statements. He cannot be bound by the acts or declarations of other alleged participants until and unless you are satisfied beyond a reasonable doubt that a conspiracy existed and that the defendant you are then considering was one of its members. In other words, your determination as to the participation in the conspiracy of each defendant must be based upon what you find to have been his own actions; his own conduct; his own statements or declarations; his connection with the acts and conduct of other alleged co-conspirators and the reasonable inferences to be drawn therefrom.

Now, you will recall that during the course of the trial objection was made with respect to certain evidence and that such evidence was received subject to connection. Thus testimony concerning acts or statements of one alleged co-conspirator, done or said in the absence of other alleged co-conspirators, although received in evidence without limitation against the alleged co-conspirator who did the

act or made the statement or admission, was admitted into evidence as to the absent alleged co-conspirator on a conditional or tentative basis.

If you find beyond a reasonable doubt that the conspiracy existed and if you also find beyond a reasonable doubt that a particular defendant was one of its members, then the statements thereafter knowingly made and the acts thereafter knowingly done by any person likewise found to be a member of the conspiracy, can be considered by the jury as evidence in the case as to any defendant found to be a member of the conspiracy, even though the statements and acts may have occurred in the absence and without knowledge of that defendant, provided such statements and acts were knowingly made and done during the continuance of such conspiracy and in furtherance of some object or purpose of the conspiracy. Thus, statements of any conspirator which are not in furtherance of the conspiracy or which are made before its existence or after its termination may be considered as evidence only against the person making them.

If you should find that the conspiracy existed and that a particular defendant knowingly participated in it, the extent of his participation has no bearing on the question of guilt or innocence. The guilt or innocence of a co-conspirator is not measured by the extent or the duration

of his participation. Even if he participated in it to a degree more limited than that of his co-conspirators, he is equally culpable so long as he was in fact a conspirator.

If one joined the conspiracy after its formation and engaged in it to a more limited degree than other co-conspirators, he is equally culpable so long as you find beyond a reasonable doubt that he was in fact a co-conspirator. Thus, each member of a conspiracy may perform separate and distinct acts at different times and at different places; some conspirators may play major roles while others may play minor roles.

In other words, it is not required that a person be a member of the conspiracy from its very start -- he may join it at any point during its progress, and be held responsible for all that has been done before he joined, and all that may be done thereafter during its existence and while he remains a member. Simply stated, using the partnership analogy again, by becoming a partner he assumes all of the liabilities of the partnership, including those that occurred before he became a member. Similarly, each conspirator need not know the identity or the number of all his confederates. The conspirators may not have previously associated together. One of the defendants may know only one other member of the conspiracy, but if he enters into an unlawful agreement with

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that other member of the conspiracy, he becomes a party thereto.

Nor is it necessary that a defendant receive any pecuniary benefit from his participation in the conspiracy as long as he, in fact, participated in it in the way I have instructed you.

The question is: Did a defendant join the others with the awareness of at least some of the basic purposes and aims of the conspiracy? If so, then he adopts as his own the past and future acts of all the other conspirators.

A final word on the second element. I told you that a conspiracy, once formed, is presumed to have continued until either its object was accomplished or there is some affirmative act of termination by its members. So, too, once a person is found to be a member of a conspiracy he is presumed to continue his membership therein until its termination, and the burden is upon the conspirator to satisfy you by affirmative proof that he withdrew and disassociated himself from it. So much for the first part of the conspiracy count.

As I mentioned to you before, the conspiracy count is divided into two sections, so I now will discuss the second section, the overt acts.

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If you find beyond a reasonable doubt that the alleged conspiracy existed and that the particular defendant was a member of the conspiracy, you must then consider the third element and that is the requirement of an overt act.

The overt acts referred to in Count 1 are not separate charges. They are part of the conspiracy count, and you may not find a defendant guilty unless and until you are convinced beyond a reasonable doubt that at least one of the overt acts charged in the indictment was knowingly and wilfully committed by at least one of the conspirators.

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The offense of conspiracy is complete when the unlawful agreement is made and any overt act is done by a conspirator to -- in the language of the statute -- "effect the object of the conspiracy." Thus, an overt act is an act knowingly and wilfully committed by one of the conspirators in an attempt to effect or accomplish some object or purpose of the conspiracy. The overt act need not be a criminal act or an act which, of itself, constitutes an objective of the conspiracy; it may be an act which is innocent on its face, but it must be of such character that it furthers, or promotes, or aids and assists in accomplishing a purpose of the conspiracy charged in the indictment.

It is not necessary for you to find that all of the alleged overt acts charged in the indictment were committed,

nor is it necessary that an overt act involve a particular defendant. It is enough if you find that at least one of the named overt acts charged in the indictment was committed by a conspirator in furtherance of the conspiracy.

As I told you before, the Government must show beyond a reasonable doubt that at least one overt act was committed in the Southern District of New York, which includes all of Manhattan. There are four specific overt acts alleged in the indictment, and they are as follows:

"In furtherance of, and to effect the other objects of said conspiracy, the defendants and their co-conspirators committed the following overt acts, among others, in the Southern District of New York, and elsewhere:

"1. On or about July 10, 1973 the defendants and their co-conspirators caused an application for an SBA loan to be submitted to the SBA office, 26 Federal Plaza, New York, New York.

"2. On or about August 1, 1973 the defendants Gerald Devins and Claude Hill met with other co-conspirators.

"3. On May 15, 1974 a $50,000 loan was received on behalf of R.B.G. from the SBA by the defendants and their co-conspirators.

"4. On May 15, 1974 the defendant, Max King, received a check for $30,000 from one of his co-conspirators."

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Now, in defining the elements of the conspiracy, I have used the words knowingly and wilfully. A person acts knowingly if he acts voluntarily and intentionally, and not because of mistake or accident or other innocent reason. The purpose of adding the word knowingly was to insure that no one would be convicted for an act done because of mistake, or accident, or other innocent reason.

A person acts wilfully if he acts voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the laws.

Those, then, are the three essential elements necessary to establish a conspiracy; first, that a conspiracy existed as charged in the indictment; second, that the particular defendant knowingly and wilfully joined the conspiracy; third, that one of the conspirators knowingly and wilfully committed at least one of the overt acts set forth in the indictment. As I told you, before you may find a defendant guilty of the conspiracy count, you must be satisfied that the Government has established each of these elements by proof beyond a reasonable doubt.

I will be about 15 or 20 minutes longer. I'm prepared to go ahead if you are willing to continue on. All right.

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Now, that concludes my charge to you with respect to Count 1, the conspiracy count. As I told you, the law makes a conspiracy a separate and distinct offense from any substantive offenses that are alleged to have been the object of the conspiracy. The second count of the indictment charges the defendant Devins alone with a substantive offense under the false statement statute. The third count charges both the defendant Devins and the defendant Hill with a substantive offense under the same statute. These counts charge a violation of Section 1001 of Title 18 of the United States Code which reads as follows:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry..." commits a crime.

Now, specifically, Count 2 reads as follows:

"The Grand Jury further charges:

"On or about July 10, 1973 in the Southern District of New York, in a matter within the jurisdiction of a department and agency of the United States, to wit, the United

States Small Business Administration, Gerald Devins, the defendant , unlawfully, wilfully and knowingly would and did falsify, conceal and cover up, and cause to be falsified, concealed and covered up, by trick, scheme and device, material facts and did make and cause to be made false, fictitious and fraudulent statements and representations and would and did make and cause to be made and use and caused to be used false writings and documents knowing the same to contain false, fictitious and fraudulent statements and entries and that the defendant, Gerald Devins, submitted and caused to be submitted to the United States Small Business Administration an application for a $50,000 loan in which it was represented that as of May 31, 1973 R.B.G. Film Distributors, Inc. was a corporation; that said corporation as of May 31, 1973 had total assets of $23,500; and that said corporation could offer as collateral for a loan inventory with a cost and net book value of $47,500 with no present liens or mortgage balance, when in truth and fact as he then and there well knew said statements and documents were untrue."

Count 3 of the indictment reads as follows:

"The Grand Jury further charges:

"On or about August 1, 1973, in the Southern District of New York, in a matter within the jurisdiction

of a department and agency of the United States, to wit, the United States Small Business Administration, Gerald Devins and Claude Hill, the defendants unlawfully, wilfully and knowingly made and caused to be made false, fictitious and fraudulent statements; and did falsify, conceal and cover up, and caused to be falsified, concealed and covered up by trick, scheme and advice material facts, and did make and use false writings and documents knowing the same to contain false, fictitious and fraudulent statements and entries, and that the defendants, Gerald Devins and Claude Hill, submitted and caused to be submitted to the United States Small Business Administration, an agreement in which it was represented that National Tele Pix, Inc. of 4584 Austin Boulevard, Island Park, New York, was a corporation; and that said corporation had produced a feature motion picture entitled Wally Western Series and could and would make delivery to R. B. Grosvalet, Inc. of a laboratory access letter for said pictures; when in truth and in fact as they then and there well knew said statements and documents were untrue."

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Now, you may not find a defendant guilty of the crimes charges, unless you are satisfied that the government has proved each of the following elements beyond a reasonable doubt:

1. On or about the date specified, the defendant used a writing or a document;

2. The writing or document contained a false, factitious or fraudulent statement or entry;

3. That the defendant knew the writing or document contained a false, factitious of fraudulent statement or entry;

4. The writing or document was used in a matter within the jurisdiction of a department or agency of the United States.

As I have told you, the fourth element is that the writing or document be made or used in a matter, within the jurisdiction of a department or agency of the United States. I charge you as a matter of law that the Small Business Administration is an agency of the United States. If you find that the defendants submitted writings or documents to the Small Business Administration, then this fourth element is satisfied.

Now, a statement is false or factitious if it is untrue and made, and known to be untrue by the person making

or causing it to be made. A statement or representation is fraudulent, if known to be untrue, and made or caused to be made with the intent to deceive the government agency to whom submitted.

The word false must be considered together with the words knowingly and willfully. You will recall that in connection with the conspiracy count I explained what is generally meant by the term knowingly and willfully. I think it is appropriate for me to give you a further explanation of that term as it is used in the context of this statute.

A person acts knowingly if he acts voluntarily and intentionally, and not because of mistake or accident or other innocent reason. The purpose of adding the word knowingly was to insure that no one would be convicted for an act done because of mistake, or accident, or other innocent reason.

A person acts willfully if he acts voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the laws.

Count 4 charges the defendant Devins alone with a violation of Title 15, United States Code, Section 645 (a) which reads in pertinent part as follows:

"Whoever makes any statement knowing it to be false, or whoever willfully over-values any securities, for the purpose

of obtaining for himself or for any applicant any loan... or for the purpose of influencing in any way the action of the administration, or for the purpose of obtaining money under... the Small Business Act comits a crime."

Count 4 of the indictment reads as follows:

"The grand jury further charges:

"On or about July 10, 1973 in the Southern District of New York, Gerald Devins, the defendant, unlawfully, willfully and knowingly did make and cause to be made false statements and did over-value and cause to be over-valued a security in an application filed with the United States Small Business Administration for the purpose of obtaining for himself and for an applicant a loan and for the purpose of influencing the action of the United States Small Business Administration, and obtaining money from the United States Small Business Administration, in that the defendant, Gerald Devins, stated and represented and caused to be stated and represented in the said application that the capital stock of R.B.G. Film Distributors, Inc. was valued at $15,000 when as he then and there well knew said statements and representations were untrue."

You may not find the defendant Devins guilty of false statements and over-valuation of the securities on an SBA ban application as charged in count 4, unless you were satisfied

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that the government has proved each of the following elements beyond a reasonable doubt:

1. That the defendant made or caused to be made a statement or placed a value or caused a value to be placed on a security;

2. That the statement was false or the security was over-valued;

3. That the false statement was knowingly made or the security knowingly over-valued;

4. That the false statement was made or the security over-valued in an application filed with the Small Business Administration for the purpose of obtaining for himself or an applicant a loan; or to influence the actions of the Small Business Administration; or to obtain money from the Small Business Administration.

You will recall in my instructions to you on false statements in violation of section 1001, I defined the term false and the terms knowingly and willfully. You were instructed that these definitions apply with equal force to the offense of false statements and over-valuation of securities in violation of 15 USC 645 (a), which is the subject of count 4.

Now, with regard to the substantive counts of the indictment, that is counts 2, 3 and 4, the government relies

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upon a statute which reads in relevant part as follows:

"Whoever commits an offense... or aids, abets, or counsels, commands, or produces its commission, is punishable as a principal."

This means that not only is the person who actually commits an illegal act, the principal, punishable, but anyone who aids and abets him in committing that illegal act is likewise punishable.

You may find a defendant guilty of the offense charged if you find beyond a reasonable doubt that the offense was committed and that the defendant aided and abetted in its commission.

To aid and abet does not mean just knowing that a crime is being committed, even if one is present during its commission. That alone is not sufficient. In order to find that a defendant aided and abetted another to commit a crime, you must be satisfied beyond a reasonable doubt that he knowingly, in some substantial measure, associated himself with the venture, that he participated in it as something he wished to bring about, that he sought by his action to make it succeed.

In other words, if one, fully aware of what he is doing, plays a significant role in facilitating a transaction prohibited by law, he is equally guilty with the person who

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directly performs the illegal acts, even though the latter played a greater or much larger role in the perpetration of the crime.

The evidence of a defendant's participation may be circumstantial, from which you may conclude that a defendant, as an aider and abetter, was a participant in the crime charged.

Now, this concludes my charge as to the specific offenses charged in the indictment. Before sending you to your deliberations, I think there are a few comments that I should make to you.

You have heard me use frequently in this charge the phrase reasonable doubt, and I told you at the beginning that a defendant was presumed innocent and that the presumption of innocence remains with a defendant unless and until the jury is unanimously satisfied of guilt beyond a reasonable doubt. In describing the elements of the various offenses charged in the indictment, I told you that the government must establish each of those elements by proof beyond a reasonable doubt.

What is a reasonable doubt? The words almost define themselves: That there is a doubt founded in reason and arising out of the evidence or lack of evidence. It is a doubt which a reasonable person has after carefully considering all the evidence.

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A reasonable doubt is not a vague or a speculative

or immaginary doubt. It is not caprice, whim or a speculation. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant.

A reasonable doubt is a doubt which appeals to your reason, your common sense, your experience and your judgment. It is a doubt which would cause a reasonable man or woman, like yourselves, to hesitate to act in relation to your own important private affairs.

Mere suspicion will not justify conviction. Suspicion is not a substitute for evidence nor is it sufficient to convict if you find that the circumstances merely render an accused probably guilty.

On the other hand, it is not required that the government must prove guilt beyond all possible doubt, but the proof must be of such convincing character that you would be willing to rely and act on it in the important affairs of your own life.

In sum, a reasonable doubt exists whenever after a fair and impartial consideration of all the evidence before you, you can candidly and honestly state that you do not have an abiding conviction that the defendant is guilty of the charge.

Now, during my explanation I have used the words knowledge and intent as an element of the crime. An act or

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a failure to act is knowingly done if done voluntarily and intentionally and not because of mistake or other innocent reason. Further comment may be helpful in your deliberations.

Knowledge and intent exist in the mind. As we all realize, it is not possible to look into a man's mind to see what went on. Therefore, the only way you have for arriving at a decision in these questions is for you to take into consideration all the facts and circumstances shown by the evidence, and to determine from all such facts and circumstances whether the requisite knowledge and intent were present at the time in question. Direct proof is unnecessary. Knowledge and intent may be inferred from all the surrounding circumstances.

Now, intent and motive should never be confused. Motive is what prompts a person to act, or fail to act. Intent refers only to the state of mind with which the act is done or omitted.

I charge you that proof of motive is not a necessary element of the crimes with which the defendant is charged. Proof of motive does not establish guilt, nor does want of proof of motive establish that a defendant is innocent. So the presence or absence of motive is immaterial except as a circumstance which the jury may consider as bearing on the defendant's state of mind or intent.

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Now, there has been some evidence introduced here relating to the disposition of the proceeds of the loan. I charge you that this evidence is not to be considered by you as evidence of guilt and was offered only as proof of possible motive.

When I instructed you at the beginning of the trial, I told you that one of your most important functions would be to assess the credibility of the witnesses who testified. You, as jurors, are the sole judges of the credibility of the witnesses; you and you alone must determine what weight their testimony deserves. In my instructions to you at the start of the case I gave you some guidelines I thought might be helpful to you as you listened to the testimony. I am going to repeat and expand on those instructions at this point.

Preliminarily, you should understand that you should not be influenced by the mere number of witnesses called by either side. The weight of the evidence is not necessarily determined by the number of witnesses testifying on either side. Rather, you should consider all the facts and circumstances in evidence to determine where the truth lies.

In assessing credibility, you should carefully scrutinize the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief.

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The degree of credit to be given a witness should be determined by his demeanor, his relationship to the controversy and the parties, his bias or impartiality, the reasonableness of his statements, the strength or weakness of his recollection viewed in the light of all other testimony and the attendant circumstances in the case and the extent to which, if at all, each witness is either supported or contradicted by other evidence.

How did the witness impress you? Did his version appear straightforward and candid, or did he try to hide some of the facts? Is there a motive to testify falsely?

In passing upon the credibility of the witness, you may take into account inconsistencies or contradictions as to material matters in his own testimony, or any conflict with that of another witness, also any inconsistencies or omissions in prior testimony, or any prior statement of material matters as to which he may have testified upon the trial.

Inconsistencies or discrepancies in the testimony of the witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience.

A witness may be inaccurate, contradictory or un-

truthful in some respects and yet be entirely credible in the essentials of his testimony.

In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or willful falsehood. If you find that any witness has testified falsely, you can do one of two things. You can either reject all of that witness' testimony on the ground that it is all tainted by falsehood and that none of it is worthy of belief, or you can accept that part which you believe to be credible and reject only that part which you believe to be tainted by falsehood.

Should you find that all or any part of a particular witness' testimony was false, you may not infer that the opposite of that testimony is the truth unless there is other evidence to that effect. Any testimony rejected by you as false is no longer in the case insofar as any finding that you may make is concerned. You will recall that I told you that an inference was a conclusion which reason or common sense leads you to draw from the facts which you find have been proved. Thus, a finding of fact may not be established merely by a negative inference arising from your disbelief and rejection of any testimony.

In passing upon credibility, the ultimate question

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for you to decide is: Did the witness tell the truth here before you? It is for you to say whether his testimony at this trial is truthful in whole or in part, in the light his demeanor, his explanations and all the evidence indicate.

Now, in connection with credibility, I want to bring your attention to one of the rules of this court which relates to the testimony of an accomplice. An accomplice is one who unites with another person in the commission of a crime, voluntarily and with common intent.

In the prosecution of crime, the government is frequently called upon to use witnesses who are accomplices. Often it has no choice. The government must rely upon witnesses to transactions such as they are.

Under federal law there is no requirement that the testimony of an accomplice be corroborated. A conviction may rest upon the uncorroborated testimony of an accomplice, if you believe it and find it credible.

However, the testimony of an accomplice should be viewed with great caution and scrutinized carefully. In assessing the credibility of an accomplice, as with that of any witness, you may consider any interest in the outcome of the case. You may consider evidence as to any benefit the witness expects to derive or has derived from his testimony or evidence as to a motive to place responsibility on others.

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If you find that the testimony of an alleged accomplice was deliberately untruthful, you should unhesitatingly reject it. On the other hand, if upon a cautious and careful examination you are satisfied that such witnesses have here given a substantially truthful version of events to which they testified, such testimony should be given appropriate consideration, together with all the other evidence in the case in determining the guilt or innocence of the defendants.

As always, the ultimate question in passing upon the credibility of a witness is, after taking into account all factors that may affect his own testimony; Did he testify truthfully before you as to events to which he testified?

Now, as I told you, a defendant is not required under our laws to prove his innocence. He is presumed to be innocent at all times and through the entire trial, unless and until the government proves him guilty beyond a reasonable doubt. For these reasons, a defendant need not take the witness stand and testify in his own behalf.

Therefore, the fact that the defendants did not testify at this trial does not create any presumption against them and I charge you that this fact must not weigh in the slightest against any defendant nor shall this fact enter into your discussions or deliberations in any manner.

In your deliberations, please do not discuss the

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question of probable punishment. That is a matter that rests on my conscience and my conscience alone, because the judge and the judge alone is the one who has the obligation of imposing sentence when and if guilt is determined.

If you do discuss it amongst yourselves then you are encroaching on my job, and I ask you not to do it. Your job is to consider the facts and to determine the facts, and my job is to pass upon the law, and in the event of conviction to impose a sentence.

If you find on all the evidence, that the evidence respecting a defendant leaves a reasonable doubt as to his guilt, you should not hesitate for a moment to return a verdict of acquittal as to that defendant.

However, on the other hand, if you find beyond a reasonable doubt that the law has been violated as charged, you should not hesitate, because of smypathy or because of any other reason, to render a verdict of guilty.

It is your duty to give separate, personal consideration to the case of each individual defendant. When you do so, you should analyze what the evidence in the case shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against some other defendant or defendants. Each defendant is entitled to have his case determined from evidence as to his

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own acts and his statements and conduct, and any other evidence in the case which may be applicable to him.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effective evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges -- judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

If it should become necessary during your deliberations to communicate with the court, you may send a note by the marshall signed by your foreman or by one of the members of the jury. No member of the jury should ever attempt to communicate with the court by any means other than a signed

writing; and the court will never communicate with any member of the jury on any subject touching the merits of the case, otherwise than in writing, or orally here in open court.

You will note from the oath that is about to be taken by the marshalls that they too, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

Bear in mind also that you are never to reveal to any person, not even to the court, how the jury stands, numerically or otherwise, on the question of the guilt or innocence of the accused unless and until after you have reached a unanimous verdict.

Now, it is proper to add the caution that nothing said in these instructions, nothing in any form of verdict perpared for your convenience, is to suggest or convey in any way or manner any information as to what verdict I think you should find. What the verdict shall be is the sole and exclusive duty and responsibility of the jury.

As I have indicated, you may take the indictment with you. I have prepared a form of verdict here which reads on top:

"We find the defendant Devins" and then a blank and then count 2, "We find the defendant Devins" and a blank, and then you report your verdict.

I have had juries come back and ask who their foreman is. Quite frankly, the first person occupying the number one seat is foreman, but you are at liberty to select whatever person you wish as foreman. How you go about your deliberations, how you conduct them, is up to you.

Counsel have a right to take exceptions to my charge and request anything further they think I have neglected to charge. I will take your requests at the side bar, gentlemen, if they are not going to be lengthy. If they are, we will take them in the robing room.

MR. HOFFMAN: No exceptions, your Honor.

MR. COVEN: No exceptions.

MR. WILSON: I have just one thing I would like to mention. Perhaps I ought to approach the side bar.

(At the side bar)

MR. WILSON: On the aiding and abetting charge, the last word was "procure" instead of "produce." That

might have been a typo. My recollection is that it is procure. I would like to check the statute on that, Section 2.

THE COURT: [illegible]cure its commission.

Anything else?

MR. COVEN: No, your Honor.

MR. WILSON: Nothing other than that.

(In open court)

THE COURT: I do have a typographical error, so I will reread to you the statute on aiding and abetting. It reads as follows:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

All right, we have the very fortunate circumstance that after two weeks everybody is intact and healthy here. We have had the benefit of having our alternate jurors number one and two standing by and paying full attention and prepared to take their place in the regular jury in the event that somebody stepped out. We are fortunate that the jury is intact. I am going to have to excuse you and thank you for your patience and presence. You were absolutely a completely necessary part of this trial. I appreciate very much your attention and the courtesies

that you have extended to the Court. Mrs. Garfield and Mr. Gartner, you are excused with the thanks of the Court and you may step down now.

(Alternate jurors excused)

(Marshal sworn)

THE COURT: Are you gentlemen agreed on the indictment that the jury might take with them?

MR. WILSON: Yes.

THE COURT: Hand the jury the indictment and form of verdict, Mr. clerk.

All right, the jury may retire to deliberate.

(Jury left the courtroom to deliberate at 4:35 p.m.)

THE COURT: I didn't think there was any issue on it and I did not charge the expert testimony. So far as the handwriting expert is concerned, I didn't think there was any issue on it, so I didn't charge it.

Please have all the exhibits available.

MR. WILSON: Yes.

THE COURT: What have you done with Exhibits 23 and 24?

MR. WILSON: I can go over them with a Magic Marker and tear the pages out.

THE COURT: I think you ought to be prepared in

the event they ask for it.

MR. WILSON: Yes.

THE COURT: Have Mr. Coven look it over and be sure you agree on it.

MR. WILSON: Yes.

THE COURT: All I ask is that you stand by. Sometimes we get a request in the first fifteen or twenty minutes or half hour, so stand by at least for that length of time. After that if you do go anyplace, please let the clerk know.

MR. WILSON: Perhaps we can stipulate ahead of time that the jury may have the exhibits.

MR. HOFFMAN: There are certain exhibits one side of which has been allowed to go in.

THE COURT: Spend a few minutes looking at what you have.

Do you have any other objections? If you can agree on what goes in, that will be fine.

All right, so that if the jury asks for anything it may go in through the clerk to the marshal. If you don't agree, you'll let me know.

(Recess)

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(Note received at 4:55 p. m. marked Court Exhibit 2.)

XXX

(Recess.)

THE COURT: I have a note from the jury here, it now being 6:30 p. m., and we will mark it as Court Exhibit 3.

XXX

(Court Exhibit 3 was marked.)

THE COURT: The notes reads: "We want the testimony of Mr. Wolff, the custodian of the films, plus Grosvalet's direct testimony and cross-examination dealing with the amount of film that he was to receive and was finally offered."

MR.COVEN: That is in a number of places Judge. We will start to get that together.

THE COURT: Why don't you all start working on getting it together. Wolff's testimony is no problem.

MR. WILSON: No.

MR.COVEN: With reference to the films he was supposed to get.

THE COURT: Grosvalet's direct and cross dealing with the amount of film he was to receive and finally offered.

MR. WILSON: And Wolff's testimony as to what, your Honor?

THE COURT: The whole thing.

MR. COVEN: Your Honor had better give us some time.

THE COURT: Wolff came on after Ferguson, so we

2 mccg

should have his testimony.

MR. COVEN: He came on after Ferguson.

(Pause.)

THE COURT: I have received an additional note from the jury and they want the testimony referring to the spin-off of National Tele Pix-ADI in which Mr. Devins was trying to buy in previous to the Grosvalet involvement. Maybe we can find that too.

MR. WILSON: That was Shields.

THE COURT: I am going to let this jury go out for dinner now. They are going to Aldo's.

MR. WILSON: You directed that that letter not be heard, the reorganization.

THE COURT: When we come back we will discuss that and tell them whatever was done here. We will get the testimony and look at it. Bring the jury in.

(Jury present.)

THE COURT: We have your notes and we are attempting to get the portions of the testimony that you want read. We will have it available for you when you get back from dinner. I am going to send you out for dinner now. You are going into a public restaurant and although you will be in a separate area, don't discuss the case. Discuss it when you get back. Talk about some other topics to relieve yourselves of any

3 mccg

thoughts you may have. We have made most of the phone calls.

After you come back I am going to let you deliberate for a while. Whether or not you finish your deliberations you'll still get transportation home. If not you'll report back here in the morning. We are getting all the information you want read to you. Don't discuss the case in the restaurant.

(The jury left the courtroom.)

THE COURT: All right, what have you got? The first note is the Grosvalet direct and cross with respect to the films. It reads "The Grosvalet testimony and cross-examination dealing with the amount of film that he was to receive and was finally offered," so I imagine it covers all film.

MR. WILSON: I have the portion.

THE COURT: Page 38, direct examination.

MR. COVEN: What date?

MR. WILSON: April 8 and 9th. I have got 77 through 83.

THE COURT: Let's go back to page 38.

MR. WILSON: I didn't look for the other films. I construed it as being the Wally Westerns.

MR. COVEN: We start off on April 8th, page 98.

THE COURT: Now, on page 38, "Mr. Grosvalet, directing

your attention to Exhibit 1 for identification, will you tell the jury what if anything you said to either" --

And the answer is "That I would receive another -- he told me about the inventory for the film" et cetera.

MR. WILSON: That is April 8.

THE COURT: This is the bottom of 38 and onto 39. That is the first part. We'll read the third paragraph thereof, or the second paragraph beginning "The inventory for the film that came out 47-5. That is what Wally Western was worth and that I would receive another film with it and I think those two films combined that" --

MR. HOFFMAN: Where do you intend to start reading?

THE COURT: "He told me about the inventory for the film."

MR. HOFFMAN: I think when you read a question and answer back to the jury it should be done in such a way that they should understand who was the "he."

THE COURT: You read the question and you know that it is Devins.

MR. HOFFMAN: I'm sorry. I thought you were not going toread the question.

THE COURT: Of course I will read the question and answer at the bottom of 38 to the middle of 39.

The next, I guess, is page 66 of the next group.

5 mccg

It is the same volume and there is a green piece of paper that separates this April 9th portion. I have a volume in here that is April 8th and April 9th. They separated it.

MR. HOFFMAN: Did your Honor say page 66?

MR. WILSON: That is the numbering over at the extreme left margin.

THE COURT: Yes, over at the extreme left margin, you see numbers and that would be page 66, line 8. That is, line 8 to line 7 on page 68.

MR. COVEN: We also have page 33, line 22.

THE COURT: Wait a minute. As to page 68, let's get this straightened out.

MR. COVEN: You passed a couple of pages.

THE COURT: Line 12. Is that agreeable?

MR. WILSON: Yes.

MR. COVEN: Can we have that number again?

THE COURT: Were you talking about something else, Mr. Coven?

MR. COVEN: Yes, page 33, line 22.

MR. WILSON: Yes.

THE COURT: It begins at line 20.

MR. HOFFMAN: I think if we asked this jury what films they were talking about they would tell us.

THE COURT: They are asking for direct testimony and

6 mccg

cross-examination regarding the amount of film he was to receive and was finally offered. Page 33, line 20 to line 22; right?

MR. COVEN: Yes, right. There is something earlier and that is April 8th, page 98, line 24.

MR. WILSON: Yes.

THE COURT: We are going backwards.

MR. COVEN: You skipped this one.

THE COURT: April 8th, line 24 on page 98.

MR. COVEN: 21 to 25.

THE COURT: That doesn't have anything to do with film.

MR. COVEN: Let's forget that one.

MR. WILSON: "It is a film proper I got from Mr. Hill."

THE COURT: No. My next one is April 9, page 66.

MR. COVEN: That is correct, line 8.

THE COURT: Then, after that, my next one is page 77.

MR. COVEN: Are you on April 9th, Judge? If you look at page 64 on April 9th, you'll see something else at top, line 2.

THE COURT: We will have to start that back on page 63, line 18.

7 mccg

MR. WILSON: Yes, I agree.

THE COURT: All right, page 63, line 18 to page 64, line 10. Correct?

MR. COVEN: Yes.

MR. WILSON: Yes, sir.

THE COURT: All right.

MR. WILSON: Then page 66.

THE COURT: Page 66, line 8 to page 68, line 12. The next one I have is page 77.

MR. HOFFMAN: April 9, your Honor.

THE COURT: Yes.

MR. WILSON: Perhaps we should start on page 76, line 23.

THE COURT: All right, yes.

MR. WILSON: I think that goes all the way over to--

MR. COVEN: Doesn't that begin at line 19?

MR. WILSON: No.

MR. COVEN: That determines the day of the conversation.

MR. WILSON: It should start at line 16. I don't know.

MR. COVEN: This gives the date.

MR. WILSON: I agree with Mr. Coven.

THE COURT: Why don't we start at line 23 and put

8 mccg

the date in there. Is that agreeable?

MR. COVEN: Yes.

MR. WILSON: Yes.

THE COURT: Does it go over to page 76?

MR. WILSON: Yes, page 76, line 23 to page 83, line 16.

MR. HOFFMAN: I object to that. All the testimony is about how many times he called, et cetera. It has nothing to do withhow many films he was supposed to get.

MR. WILSON: It deals with his attempts to get those films.

MR. HOFFMAN: That is not the question.

MR. WILSON: You can't separate the two.

MR. HOFFMAN: You sure can. I would object from page 77, line 13, line 12, and ends on line 13, page 79. All the testimony is: How many times did you call and how many times did you ask. Nothing to do with how many films he got and how much film was offered.

MR. WILSON: All the testimony was with respect to what he was to get and what he was offered.

THE COURT: What he was to receive and what he was finally offered.

Page 77, line 15.

MR. HOFFMAN: I would think to line 12, your Honor.

9 mccg

THE COURT: Line 1', as I see it, and then to page 80, line 18.

MR. HOFFMAN: 81, the first answer.

THE COURT: All right, page 81, line 2.

MR. HOFFMAN: Yes, sir.

THE COURT: Anything further in there?

MR. WILSON: I think if you are going to talk about King offering films, I think you also should have the fact that he asked King for them. If you take all this testimony, all we have is King offering films and Grosvalet refusing. It goes right along that Grosvalet bugged King for two months once a day.

MR. HOFFMAN: I have no objection to cutting out the last line, page 80, "Who offered them to you?" The answer is on page 81. I have no objection to leaving it out, the answer being "Mr. King."

THE COURT: Then we will go to page 80, line 24. Then we go on to page 83.

MR. WILSON: How about 82 at line 15? That is where it starts.

THE COURT: Yes, I suppose so. Page 82, line what?

MR. WILSON: 15.

THE COURT: Line 20?

MR. WILSON: 15.

10 mccg

THE COURT: Yes, 15.

MR. WILSON: Excluding the objection.

THE COURT: Yes, the objection will not be read.

Page 83, line 16.

MR. WILSON: I think so, yes.

THE COURT: Anything further?

MR. WILSON: Yes, we are into another day, April 10th.

THE COURT: Nothing further in this volume?

MR. WILSON: Page 22, cross-examination on the 10th.

MR. HOFFMAN: It is MCBR 22, yes.

MR. WILSON: I have 22 through 34 on April 10th.

MR. HOFFMAN: Line 11 through 14.

THE COURT: Page 22, lines 11 through 14. The whole following page, which would be 23.

MR. WILSON: Yes.

MR. HOFFMAN: And the following page, page 24.

MR. WILSON: Except for the colloquy.

MR. HOFFMAN: The following page, page 25.

MR. WILSON: I agree.

THE COURT: Okay.

MR. HOFFMAN: And then I have page 28.

MR. WILSON: Page 26, also.

MR. HOFFMAN: What do you have on 26? It is all sustained objections.

11 mccg

We go over to page 28, the whole page.

THE COURT: All right.

MR. HOFFMAN: All of page 29 and page 30 down through line 19. After that it is all sustained objections on page 30. Then page 32, line 5 through 11.

THE COURT: Okay.

MR. HOFFMAN: That is when Mr. Greenberg came in the courtroom and we jumped over to page 34 when I resumed questioning him on line 19, which refers to the last question on page 32:

"Do you remember that conversation?

"A I remember the conversation."

And that is it.

MR. WILSON: What were the pages between 25 and 32?

THE COURT: 28, 29, page 30, line 19.

MR. HOFFMAN: Page 32, lines 5 to 11. Page 34, lines 19 to 20. If you look at page 32, your Honor, the last question was --

THE COURT: Page 34, lines 19 and 20.

MR. HOFFMAN: That was a response to the last question. That is it.

THE COURT: All right.

MR. FARLEY: In that volume on April 11 there is some more.

12 mccg

MR. COVEN: April 11th?

THE COURT: What page?

MR. FARLEY: Page 45 and 46. Page 45, line 24 through page 46, line 10.

THE COURT: All right.

MR. WILSON: Yes.

THE COURT: Is that all?

MR. FARLEY: That is all we have at the moment, your Honor.

MR. HOFFMAN: That is it.

THE COURT: All right, be back here as promptly as you can. Find that spin-off date.

MR. COVEN: I think we can see how Mr. Wilson's summation is beginning to cause problems. I objected to it.

THE COURT: All right, be back here as promptly as you can and get whatever else is needed.

(Recess.)

THE COURT: Let the record show that it is now 8:45 p. m.

(Jury present.)

THE COURT: Not all of the testimony that you asked for has been transcribed and that has been part of our difficulty in getting it together for you. It has taken some time to get it all together.

13 mccg

We do have your first note which is Court Exhibit 3 in which you requested the testimony of Mr. Wolff and Mr. Grosvalet on direct examination dealing with the amount of film that he was to receive and finally offered. The testimony of Mr. Wolff has not been transcribed but Mr. Russell will read the minutes of that testimony to you. The portion of the testimony with respect to the amount of film that Mr. Grosvalet was to receive and finally offered has been transcribed and I will read that to you.

You have also requested testimony referring to the spin-off of National Tele Pix-ADI, in which Mr. Devins was

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trying to buy in previous to the Grosvalet involvement. That has not been transcribed but we will find the minutes of that and I thought what we would do is read to you now Mr. Wolff's testimony, Mr. Grosvalet's testimony and if you wish to continue to the places until we get the balance of the testimony that you requested with respect to the spin-off, you may do so. That is, if you want to wait until that is ready before you continue deliberations, all right, and then we will get that and read it to you before you retire for your deliberations.

All right, Mr. Russell.

(Record read.)

THE COURT: Is there anything further you want with

14 mccg

respect to that interrogation?

THE FOREMAN: That is it.

MR. HOFFMAN: Between Mr. Wilson and myself I think we have the other testimony you wanted. I have the volume that was typed up yesterday.

THE COURT: All right, let me see it.

MR. WILSON: Could we have a side bar?

THE COURT: Yes.

(At the side bar.)

MR. HOFFMAN: We have Feltner's direct examination and cross on the spin-off. That is in here.

Do you have Shields?

MR. WILSON: I think we are going to be a couple of minutes getting this.

THE COURT: All right.

(In open court.)

THE COURT: It may take us a few minutes to get the response to the other question. Please retire to the jury-room and we will call you as soon as we get that. I indicated that you are within reason in charge of your own deliberations. I don't know whether it would be appropriate for us to suspend for tonight at about 10 o'clock. As I indicated, we have transportation to take you all to your homes and we would resume in the morning and continue from there. Why don't

15 mccg

you retire now and we will get this information and call you back as soon as we have it.

We have been trying to get Mr. Marvin Walker, but there has been no answer. We are continuing to try. We will keep trying. We have made all the other phone calls.

(The jury left the courtroom at 9:25.)

THE COURT: I want to tell you that Juror Number 10 didn't want to go out and eat and she stayed in the juryroom in the presence of a marshall when the jury went out.

MR. HOFFMAN: No objection.

MR. WILSON: No.

(Recess.)

MR. WILSON: Your Honor, beginning at that page on the 18th, my cross-examination of Grossberg, I handed him Exhibits 46 and 47 and asked him to identify the documents.

THE COURT: I'm at page 112.

MR. WILSON: He identified the documents. The documents were offered in evidence. There was colloquy and you ruled that they would be received for the matters stated in there, but the fact that they showed the relationship between Devins and Grossberg, what had been represented to Grossberg by Devins, and in the letter in about the first or second paragraph the representation is made that Prestige Industries is going to be spun-off in the near future.

Down a. the bottom of the letter it refers to National Tele Pix, also known as Prestige Industries. On 47, which I think is the information sheet, also in the last paragraph of the letter there is mentioned Mr. Devins and Mr. Hill as being representatives of Prestige, and then I think the information sheet it also speaks of the Prestige-National Tele Pix relationship. This is all material that was submitted to both Grossberg and Kirkman in connection with the negotiations between Devins and those two for the merger.

MR. COVEN: That is an absolutely improper and wrong statement and I say to your Honor that the paper that you have in front of you is an absolutely monstrous irrelevant smoke-screen, having absolutely nothing to do with this case, your Honor.

If your Honor submits that piece of paper again to the jury you will have compounded the wrongful smoke-screen and confusion that the prosecution has attempted to lay about this matter to furnish a motive. Anybody who knows the slightest bit about corporate things knows that it has no connection with this case.

MR. HOFFMAN: If you will notice in the testimony at page 112 -- let me just make sure -- I'm sorry, on page 113 when we get to line 7 -- I think this is what Mr. Coven is referring to -- there is a question as to which company

17 mccg

was to acquire -- this is line 6 -- and the answer is: "I believe it was called First Prestige." First Prestige was not Prestige Industries. It was another company in which Mr. Devins had an interest, which was going to merge with Kirkman and Grossberg. That is why there is this inaccuracy. They are talking about First Prestige, but that is not Prestige Industries.

MR. COVEN: First Prestige is a totally different company. I am handling the matter of First Prestige in California right now. It has absolutely nothing to do with Prestige Industries. It is a totally wrongful confusion deliberately done by the prosecution to add a smoke-screen and to throw malarkey and garbage to furnish a motive which cannot even possibly be taken out of this document that you have in front of you.

If your Honor would read the document you have in front of you for just a moment you will note that there is not one iota of relevance in it to this case, or anything in it.

MR. WILSON: Those documents were testified to by Mr. Grossberg. He said they were given to him by Mr. Devins in connection with the proposed merger. I am not saying that all the statements made in those documents are true. All I am saying is that this is the piece of paper with the representa-

18 mccg

tions thereon which Devins gave to Grossberg and we are not vouching for the truth of the matters therein.

I would submit that Mr. Devins used the names Prestige and First Prestige interchangeably, just as he used the name National Tele Pix.

MR. COVEN: How can you dare make that statement? You are misleading the Court when you say you are suggesting it. There is not one piece of evidence in this case that will permit you to make that suggestion. I represent the company and I have been representing it in the State of California. I have nothing to do with Prestige Industries in this case.

MR. WILSON: The document speaks for itself.

MR. COVEN: I know, because you are attempting to abuse and mislead. You know that First Prestige is not Prestige Industries. You are trying to abuse the jury and abuse and mislead. I say that is wrongful.

MR. WILSON: I know that First Prestige is Devins' company and Prestige is the renamed National Tele Pix. All I am saying is that in many of Devins' deals it is unclear whether he is talking about First Prestige or Prestige Industries. He speaks about Prestige Limited, which is a third form. The fact is that he is speaking of a Prestige organization.

19 mccg

1-4

MR. COVEN: Why don't you stop that. This is prosecutorial misconduct and willful deception of this court and this continued comment by Mr. Wilson is disgraceful.

MR. WILSON: The documents speak for themselves. The thing I think we all agree on is that Grossberg testified on this witness stand that Devins gave him those documents. He wasn't sure if he gave it to him personally or by messenger, but he testified that they were delivered to him by Devins.

THE COURT: What is wrong with my reading from page 112?

MR. COVEN: Because Mr. Wilson knows that the papers he has before him or that he has submitted do not concern Prestige Industries.

THE COURT: All I have got is a question from the jury that I want to respond to. If there has been something done by the prosecutor and that can be substantiated, that is for post-trial but not now.

MR. WILSON: Mr. Grossberg says "I believe it was called First Prestige." However, he identified the document which doesn't mention First Prestige. They mention Prestige and they mention Prestige Limited. Those are documents received by Mr. Grossberg in connection with his negotiations with Mr. Devins.

THE COURT: What is wrong with my reading from page

20 mccg

112?

MR. WILSON: Through 113.

MR. COVEN: There is nothing there, Judge, that would indicate that. What should be done here, most respectfully, your Honor, is that your Honor should direct the jury to disregard any of that statement or matter.

MR. HOFFMAN: If it please the Court, when a spin-off was being discussed it was obvious that the spin-off was a company owned by ADI, which was --

THE COURT: Don't give me facts that are not in the record.

MR. HOFFMAN: It is in the record.

MR. WILSON: No, it is not.

THE COURT: Where?

MR. HOFFMAN: Page 249 of the volume before your Honor. That is where it starts, on page 249, lines 13 through 17. Mr. Feltner is asked by Mr. Coven: "The original deal is for a spin-off of National Tele Pix and that changed. At this time Mr. Devins said to me 'I would like to do this deal in a different fashion.'

"Q Yes.

"A 'And can you make the same basic deal that we were putting into National Tele Pix available,'" and then, "Yes."

21 mccg

MR. COVEN: I don't agree with that. I absolutely don't agree with that.

MR. HOFFMAN: That is what is in the record.

MR. COVEN: Don't tell me what is in the record. I don't agree with that. His Honor said all that statement about the organization mergers, spin-off, all of that smoke-screen and bluff went out of this case.

THE COURT: Page 249 to where?

MR. HOFFMAN: 249 line 13 through 20. Then it goes to page 322, line 17. Do you have it, your Honor?

THE COURT: Yes, I do, line 17. They start talking at line 17 through the end of that page. We then go to the following page which for some reason is numbered 324 -- there is no 323 -- and on that page we go from lines 2 through 16 continuing a discussion about the spin-off.

MR. COVEN: That has nothing to do with any spin-off. The word spin-off means that stock is distributed by a parent company as stock held by a subsidiary company. There is nothing to do with spin-off.

THE COURT: The jury wants to know something about where the word spin-off is mentioned.

MR. COVEN: The spin-off is not in this testimony.

THE COURT: Wait a minute. Page 322 line 17 to where?

22 mccg

MR. HOFFMAN: To the end.

THE COURT: I think the whole page goes in.

MR. HOFFMAN: I think the objection is sustained. We then go to page 336.

THE COURT: Why not 325? Let me go back.

MR. HOFFMAN: If your Honor wants to, I have no objection. I didn't think it had anything to do with spin-off, but other matters concerning the company.

THE COURT: I would say 322, 324 and 325.

MR. COVEN: Just a moment, your Honor.

MR. HOFFMAN: Then we go to page 336, line 19, to the end of that page from 19, and then page 337.

THE COURT: There is no answer to that question on line 19.

MR. HOFFMAN: If your Honor will read the following page --

THE COURT: The objection was sustained to that question.

MR. HOFFMAN: Then let's forget that. Page 337 from line 2 through line 20. I don't know if you want to go after that but that to me was the discussion of spin-off on that page.

THE COURT: I will go to the bottom of that page.

MR. HOFFMAN: It is all sustained objections.

THE COURT: I am going to read 249, line 13 through line 20; page 322, line 17, pages 324 and 325.

MR. COVEN: What about 336 and 337?

MR. HOFFMAN: I am sorry, 336 was a sustained objection, but on page 337, if you start at the top, line 2, and you go down through line 20 --

THE COURT: All right.

MR. HOFFMAN: That is it. Page 337, line 2 to line 20.

MR. COVEN: I object, your Honor.

THE COURT: Very well, bring the jury in.

MR. WILSON: There is another one on the Shields cross-examination at the very end, line 23, page 102. The question is:

"Do you remember you requested the name of National Tele Pix to Prestige Industries?

"A Yes, I think Gerry Devins recommended it and I agreed with it."

MR. COVEN: That has nothing to do with this.

MR. WILSON: It deals with the name change.

MR. HOFFMAN: Is your Honor going to read from those two documents, not for the truth but --

THE COURT: I am not going to read the documents.

(Jury present.)

24 mccg

THE COURT: Members of the jury, I have some testimony to read to you with respect to the spin-off of National Tele Pix and ADI in which Mr.Devins was trying to buy in. I will read the direct examination of Mr. Feltner first.

(Record read.)

(Off the record discussion at the side bar.)

THE COURT: You gentlemen agree that what the Court Reporter read to us at the side bar had nothing to do with this matter?

MR. COVEN: Yes.

MR. HOFFMAN: Yes.

MR. WILSON: Yes.

THE COURT: Why doesn't the jury go back in the juryroom and as soon as the cars are here I will call you back and give you some further instructions.

(The jury left the courtroom.)

Now, in connection with the motion, and I am looking at the motion papers, the supporting affidavit and the affidavit of Mr. Wilson, the supplemental affidavit

of Mr. Grosvelat.

Your affidavit, Mr. Brodsky, sets forth three grounds for setting aside the verdict. One, newly discovered evidence, inadequate assistance of counsel, and failure of the government to provide the defendant Brady material as required by 18 USC, Section 3500.

In connection with the affidavit of Sylvie Kristof and referring to the credibility and motives of Grosvelat with respect to the question of Devins' handwriting being on the application, I believe that the testimony of Mr. Grosvelat was to the effect that he thought it was the writing of Mr. Devins and that the testimony of the handwriting expert who did testify was that it was not Devins' handwriting, and the admission of Mr. Siviglia that it was in his handwriting forms the basis upon which to conclude that the jury was not misled and could not have been misled into believing this was Devins' handwriting on the application.

Mr. Grosvelat in his testimony here indicates even though he had given a supplemental affidavit or an affidavit -- supplemental affidavit I guess it is, that he had not given a chronology of events to Mr. Wilson. I am going ahead of myself. But in any event in connection with his 3500 material, I don't believe under any strech of the imagination as reported to me as to what was involved

with Mr. Grosvelat's interview with Mr. Wilson -- I think only upon an extreme stretch of the imagination could that be deemed to be 3500 material.

MR. WILSON: That was submitted, your Honor. That was marked 3503 and was turned over to the defense, that chronology.

THE COURT: The question of him answering -- your review of the questions you were going to ask him and the answers he gave?

MR. WILSON: No, I was talking about the chronology.

THE COURT: I jumped ahead after that to the 3500 material. Now, even if that were 3500 material, in view of Mr. Grosvelat's testimony that the answers that he gave on the stand comported with the answers that or responses that Mr. Wilson had put to him, there would have been no use to be made of that turned over to the defense since he stated that the answers that he gave were in conformity with that. If there were several pages of notes that Mr. Wilson had, he said there were only 1, 2 or 3 or very few numbered that had any answers, quoting him directly, and those were only sentences that contained a few words at the most. I believe that is in the category substantially of notes of interviews taken by the United

States Attorney which are usually not considered 3500 material.

As I say, it probably was not 3500 material. If it was 3500 material there was no deliberate withholding of it from the defense and that the turning of it over to the defense would not have resulted in a different verdict from this jury nor could it have conceivably led to a different result from this jury.

The question of the newly discovered evidence with respect to the cancellation by the SBA of Grosvelat's loan was explained in Mr. Wilson's papers to the extent that the government or at least the United States Attorney's office had no involvement therein and it is not a matter that is under consideration at the time of Grosvelat's testimony and was not a consideration that might have been used by the defense to attack the credibility of Mr. Grosvelat.

The question with respect to failure to provide Brady material with respect to the witnesses Sylvie Kristof, Judy Christo and Leonard Kirtman, I find that it has not been substantiated in the papers submitted or the testimony received here.

The substantial question is the matter of inadequate assistance of counsel. While it has nothing to do with the decision that I make here in I believe it

requires some mention. The fact that with respect to certain of the testimony of Mr. Coven, on his own initiativ raised a question of the attorney-client privilege which I think is required of the attorney in any event when he is questioned with respect to it. And the fact that he was permitted to testify as to certain matters but that the privilege was invoked as to other matters does not indicate a full and complete disclosure of all of the items that might have been disclosed on a hearing of this kind. As I say, I am giving no weight to the fact that the privilege was invoked here, but I do think it bears some comment with respect to the ability of Mr. Coven to defend himself against the charges which have been leveled here with respect to his handling of the trial of this lawsuit.

Insofar as the question of whether or not Mr. Coven was acquainted with the question of the approach of Mr. Devins to secure immunity for himself in return for offering up Mr. Coven as a prospective defendant to the United States Attorney, Mr. Devins readily admitted on the stand here that he had done so prior to his retaining Mr. Coven to defend him and with full knowledge of his having done that he still elected to proceed to retain the services of Mr. Coven in defense of his lawsuit. He had a choice either to retain Mr. Coven or not to retain him.

With the knowledge that he had, I think he made a knowing choice of counsel to represent him in connection with the defense of these lawsuits.

As far as the conduct of the trial, in the very beginning of this trial I think Mr. Coven indicated that it was his opinion that this was a documents case; that what was involved was the question of what did these documents mean, by whom were they executed, and so forth. I believe he had offered Mr. Wilson the opportunity to consent to the admission of all of these documents into evidence, and Mr. Wilson refused because he thought tactically it would be better, as I recall it, to have the witnesses come in and spread the whole, as Mr. Wilson thought, gory details of what went on before this jury. Mr. Wilson and I grew to regret that decision because the first document that was offered could not be authenticated and there was a question as to whether or not any of the documents were going to go in because Mr. Coven properly raised the objections as to the authenticity of the documents and the records of the SBA being such as they were, having no receipt stamps or any other kind of stamp to indicate when they had received the documents or any other way of really identifying what was submitted to them and what was not.

I suggest Mr. Coven and the manner in which he handled that almost succeeded, on a technicality, as I see it, of having the indictment herein dismissed. So I believe that he was adequately prepared to try this case; that he did try it well. We had our differences as we went along because of certain matters that arose during the trial and his failure to abide by the manner in which I like a trial to be conducted and the promptness and attention that I like attorneys to give when a case is tried before me; but as far as the manner in which he conducted this trial, far from being shocked or my conscience being shocked by the manner in which he presented it, I believe that he handled it competently. He is an experienced counsel and he knew what was involved in this case, and I find that there was adequate representation.

The only, I must confess on the record, criticism that I might have was the question of the summation which appeared to me to be short. But I don't find in any way that that was a failure of representation. Every attorney has a different way in which he appraises the effect upon a jury of what he has to say and I cannot and do not find that that item arose to the level of inadequate assistance of counsel.

I suppose many of us believe that cases are not won

in either opening statements or summations of counsel but by the quantum of the proof, and I can't say in this case that the quantum of proof was such that a jury would have come to a different verdict if they had the most outstanding summation that has ever been delivered in any court on behalf of Mr. Devins at the time of summation in this case.

Under all the circumstances, the motion is denied.

MR. WILSON: Your Honor, may I hand up these documents now that it appears this case is going to be sent up and that it be considered as part of the data?

THE COURT: I have received some documents and I'm wondering if you have made available to the defense counsel or wish the defense counsel to have available to him some confidential documents that have been submitted to me before sentencing is imposed.

MR. WILSON: I have no objection.

MR. BRODSKY: Submitted to you, your Honor, by Mr. Wilson?

THE COURT: Yes. In context with the sentencing. I feel they are matters you ought to be able to have.

MR. WILSON: Are these documents submitted through the Probation office?

THE COURT: I don't know if that is the case or sent directly to me.

CERTIFICATE OF SERVICE

April 1, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Richard A. Greenberg